IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 8599 of 2007

1. Shri Tatyabai Shival Pore
and others ..Petitioners

vs.

1. Ananta Babu Kumbhar & anr. ..Respondents

Shri G.S.Godbole with Shri Kuldeep Patil for petitioners.

Shri A.P.Kulkarni for respondents.

CORAM: S.C.DHARMADHIARI J.
12th December, 2007

P.C.

1. Writ Petition No. 8599 of 2007 is directed against the order passed on 4th April, 2007 in Reg.Civil Suit No.208 of 2005 (below Exh.5).

2. That was an application for temporary injunction ;preferred by the present respondents/original plaintiffs who had instituted the said suit seeking perpetual injunction against the present petitioners from obstructing their possession in respect of the suit property. I have perused the copy of the plaint which is annexed at Exhibit A and it describes the suit property as Gat No.1272/1G admeasuring 2 H with boundaries as specified

therein. The grievance in the plaint appears to be that this property was belonging to the Government and it has been allotted on permanent basis for cultivation to the respondents/original plaintiffs in 1976. The allotment is on certain terms. Upon the land being handed over and allotted, the plaintiffs levelled the same and thereafter improved upon it by constructing a well in the corner thereof.After the improvements are set out, it is contended that the present petitioners have their lands on the southern boundary bearing Gat No.1227. That land is also allotted to the present petitioners/original defendants before me by the Government for the purpose of cultivation and presently some trees are planted. The allegation is that on 1st December, 2005, the present petitioners tried to encroach upon the land of the respondents/original plaintiffs. The encroachment was to the extent of about 1 A allegedly and even the petitioners obstructed the respondents from utilising the well and drawing water therefrom. Upon this incident of 1st December, 2005, the plaint averment is based and ultimately relief claimed. The plaint is

lodged on 17th December, 2005. The application for interim injunction was made in terms of the prayers and interim injunction is claimed to protect the possession not of Gat No.1272/1G i.e. the suit property but averment is that the suit land as shown in the panchanama dated 28th November, 2005 is in possession of the present respondents and that is how the situation at site is and injunction be granted in terms thereof.

3. The Trial Court has passed the order after hearing both sides on the plaintiffs' application by observing as under:

> "17. I have gone through the entire record before me and submissions of both advocates. It is pertinent to note that, main objection of the defendant that, land of plaintiff is situated towards Eastern side of the land of defendant. But I have gone through the entire documents filed by both sides, affidavits filed by both sides. It is pertinent to note here that, affidavit filed by defendant of Namdeo Thakoba

Kore stated in his affidavit that, defendants are in possession of Gat No.1227/1 and present plaintiff also not disputed that, defendants are in possession of Gat No.1227.

18. From the documentary evidence filed by the plaintiff it appears to me that the suit property was allotted to the plaintiff no.1 by the Government. Thereafter by obtaining necessary permission the plaintiff no.1 sold this land to plaintiff no.2 and plaintiff also filed the map of suit property below list Exh.23 at Sr.No.9. It is pertinent to note here that, on perusing panchanama dated 28.11.05 it appears that, the possession of the suit property detailed described in panchanams was handed over to the plaintiff bearing Gat No.1272/1G admeasuring 2 Hector situated at Mouje Bharnewadi. The defendants failed to establish before the Court, neither he has filed any documentary evidence to establish before the Court at this stage

> that, the land of the plaintiff is towards Eastern side, but from the documentary evidence before me at this stage, it is established by the plaintiff that, the land of defendant is towards Southern side of the suit land. Therefore, I discarded the contentions raised by the defendant. On the contrary, from the documentary evidence before me, I come to conclusion that the plaintiff is in possession over the suit property. Therefore, the plaintiff is having prima facie case, balance of convenience lies in his favour and if the defendants are not restrained from causing obstruction over the suit property, he will suffer irreparable loss. Therefore, I gave my findings accordingly towards these points and pass the following order."

4. The criticism of Shri Godbole appearing for the petitioners/original defendants is that while granting injunction also in favour of the present petitioners to protect the present petitioners' possession in respect of their land

bearing Gat No.1227/1 and 1227/2, the Trial Court has not relied upon that panchanama and passed the order which conflicts the orders passed in the present petitioners' favour and which have remained unchallenged. In other words, when the present petitioners are restrained from causing obstruction to peaceful possession of the property i.e. the suit property, there was no occasion to refer to the panchanama dated 28th November, 2005 and that has caused the entire confusion so also there is a reasonable apprehension in the mind of the petitioners that under the garb of this injunction order the respondents may encroach upon the properties belonging to the present petitioners and defeat the interim injunction in their favour. It is this order of the Trial Court which has been confirmed by the lower Appellate Court. The lower Appellate Court had two Appeals before it, namely, Misc.Civil Appeal No.18 of 2007 which was by the present petitioners challenging the interlocutory order in favour of the present respondents. I am not concerned with the order passed in Misc.Civil Application No.19 of 2007 but since the appeals are decided together and lower Appellate Court

dismissed both the appeals, I called upon the parties to file appropriate affidavit so that the during the trial of the concerned suit, there is no confusion at site. The affidavit has been filed by the present petitioners and they have stated in the affidavit that the Court Commissioner was appointed by the Trial Court for the purpose of the measurement of the land. Commissioner's report is dated 14th August, 2006. The respondents' land could not be measured by him. However, a statement on affidavit before me is that the land which is claimed to be in possession of the respondents/original plaintiffs is part of Gat No.1227/1. Gat No.1227/1G was not measured but the petitioners undertake to this Court that they will not obstruct possession of the respondents in respect of Gat No.1227/1G. Such affidavit was expected from the original plaintiffs as well. I had clarified that this would all be without prejudice to the rights and contentions. However, the learned Counsel appearing for the respondents, states that the panchanama is more authentic document and deserves to be relied upon and rightly relied upon in comparison to the Commissioner's report

which indicates that the land of the present respondents/original plaintiffs was not measured. Such an incomplete report cannot be the subject matter of any order is the submission.

5. However, without prejudice , a statement is made in para 6 of the affidavit affirmed on 12th December, 2007 which reads thus:

> "6. However, the boundaries shown and consequently the observation as to our encroachment is incorrect. However, without prejudice to my contentions, I will maintain the situation which is mentioned in the Court Commissioners Report as to actual physical possession (without reference to Gat number or boundaries) only as and by way of interim arrangement. The said position in fact is in conformity with the panchanama dated 28.11.2005. I expressly preserve my right to object to the Court Commissioner Report which has been done by me by filing objections dated 25.9.2006 vide application at

Exh.55"

6. To my mind, any observations at this stage are likely to prejudice the case of the parties before the Trial Court, more so, when the suit has been expedited. In such circumstances, in the light of the further affidavits filed before me, it would be appropriate to confine the orders under challenge and in favour of the present respondents in their application (Exh.5) to the properties bearing Gat No.1272/1G. That being the suit property, the petitioners are restrained from disturbing the plaintiffs' possession in respect of Gat No.1272/1G till hearing and final disposal of the suit. Equally, the respondents shall also confine their activities to the Gat number referred to above and abide by the interim order in favour of the present petitioners with regard to Gat Nos.1227/1 and 1227/2. Thus, the situation as per the Commissioner's report and map annexed thereto to be maintained at site without prejudice to the rights and contentions of both sides.

7. It would be open for the respondents to

apply for fresh measurements in case occasion arises and such application, should be dealt with by the Courts below in case it is unable to complete the trial of the suit within the time frame stipulated by the lower Appellate Court, uninfluenced by any orders till date. Since the lower Appellate Court has directed that the suit be disposed of within six months, the parties are expected to cooperate in expeditious disposal of the same. The parties shall not seek unnecessary adjournments and endeavour should be made by the Trial Court to dispose of the suit as expeditiously as possible and in any event within a time frame stipulated by the lower Appellate Court. Needless to state that the reference to the panchanama in the operative part of the Trial Court below Exh.5 as confirmed in Misc.Civil Appeal No.18 of 2007 stands deleted. Petition disposed of in the above terms. No order as to costs.

(S.C.DHARMADHIKARI J.)